The Hertz Corporation *and* National Federation of Guards, Local 5. Case 4–CA–16702

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On August 8, 1989, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge that the Union's breach of an express oral bilateral agreement to submit the parties' negotiated contract to a ratification vote justified the Respondent's refusal to implement the new contract's terms. Although duly executed by both parties, the contract could not become effective until the agreed condition precedent of ratification had been satisfied.[2] The Supreme Court has stated that ratification agreements are enforceable if agreed to by the parties, *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958), and the Board has held that, when a union has agreed to ratification as a precondition to the employer's duty to perform, the employer is under no enforceable obligation to execute the written contract prior to ratification. *Santa Rosa Hospital*, 272 NLRB 1004, 1006 (1984).

It is true that ratification is only a permissive subject of bargaining, and that under the authority of *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1971), the Union's breach of an agreement to obtain employee ratification may not be an unfair labor practice. However, it does not follow that the Respondent violated Section 8(a)(5) by thereafter insisting on compliance with the ratification agreement.[3] In so doing, the Respondent is not bargaining to impasse about a permissive bargaining subject. Bargaining in this case has been concluded, and the parties have expressly agreed to the ratification procedure. The Union's subsequent repudiation of the ratification agreement cannot unilaterally reform the parties' agreement or return the parties to the preagreement negotiating stage. Accordingly, because the Union has never complied with the parties' agreement to ratification as a precondition to the implementation of the substantive terms of their collective-bargaining agreement, the Respondent never was obliged to put those terms into effect.[4]

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

[1] The Acting General Counsel has, in effect, excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt, pro forma, the judge's finding that the Respondent did not violate Sec. 8(a)(5) of the Act by failing and refusing to provide information requested by the Union.

[2] We find no merit in the Acting General Counsel's argument in exceptions that the agreement on ratification as a precondition to implementation of the contract was ''fatally untimely'' because it took place after the negotiation of all substantive terms of the contract. Precedent cited in support of this argument, e.g., *Mount Airy Psychiatric Center*, 230 NLRB 668 (1977), involved unilateral and belated attempts by a negotiating agent to raise ratification or review by principals as a limitation on the agent's authority to conclude a contract. This precedent is inapposite to situations, as here, where both parties' agents mutually agree at any point in ongoing negotiations that ratification procedures must precede implementation of a contract.

[3] In fn. 22 of *Pittsburgh Plate Glass*, the Supreme Court quoted approvingly from *Painters Local 1385 (Associated Contractors)*, 143 NLRB 678 (1963), which held that an employer may properly insist that a contract include a permissive term to which the union had previously agreed.

[4] Member Cracraft and Member Devaney also rely on the majority opinion in *Beatrice/Hunt-Wesson*, 302 NLRB 224 (1991). In that case, the Board affirmed a judge's finding that the employer did not violate Sec. 8(a)(5) by refusing to execute a bargaining contract which the parties had agreed would be subject to ratification by unit employees. They do not discern any meaningful distinction between Beatrice and the instant case. Similarly, Chairman Stephens finds that the result here comports with the analysis set forth in his concurring opinion in Beatrice.

Margaret M. McGovern, Esq., for the General Counsel.
Jacob P. Hart, Esq. and *Adena Adler, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried at Philadelphia, Pennsylvania, on March 9 and 10, 1988. The charge and amended charge were filed on July 14, and August 28, 1987, respectively. The complaint and notice of hearing issued on August 31, 1987.

The complaint alleges that the Hertz Corporation (Hertz) engaged in conduct violative of Sections 8(a)(1) and (5) and 8(d) of the Act by failing and refusing to abide by, and implement the terms and conditions of employment embodied in a collective-bargaining agreement, agreed to and executed by both parties, and by failing and refusing to provide the Union with information requested by it., and necessary for the purposes of collective bargaining.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material, engaged in the rental and sale of motor vehicles with its principle

place of business located at 660 Madison Avenue, New York, New York.

During the past year, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $500,000 and purchased and received materials valued in excess of $50,000 from points directly outside the Commonwealth of Pennsylvania.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT[1]

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time security guards employed by the Hertz Corporation at its facilities located at Cargo City, the Philadelphia International Airport, Center City, Philadelphia (19th Street), and Morrisville, Pennsylvania; excluded: all other employees, drivers, mechanics, and clerical employees and supervisors as defined in the Act.

IV. ALLEGED UNFAIR LABOR PRACTICES

The Facts

Respondent employs approximately 12,000 employees, one-half of whom are represented by labor organizations covered by approximately 255 collective-bargaining agreements.

There are four locations involved herein. The two airport locations, known as the airport and Cargo City, collectively referred to as the airport, the Langhorne location, sometimes referred to as Morrisville, and a downtown Philadelphia location, in Center City also referred to as 19th Street. These locations are in the geographic zone within Respondent's organization which is referred to as the east central zone. It stretches from Albany, New York, to Philadelphia, Pennsylvania, and includes 9 to 12 cities.

The four locations involved herein are the only locations in the metropolitan area where guards are employed. There are approximately 11 or 12 guards at these four locations.

Respondent operates rental offices at the airport and at the Center City locations. The facility at Morrisville repairs and sells used automobiles.

In its original petition for representation, filed in the spring of 1986, the Union sought to represent only the guards employed at the airport and at Cargo City which, as stated earlier, is located at the airport.

The Center City and Morrisville locations were included in the unit after Respondent stipulated to an election, based on this modification.

On May 16, 1986, the Board issued a certification of representative designating the Charging Party herein as the exclusive representative of a unit of guards employed by Respondent in the unit described supra.

William Cottrell, then General Counsel for the Union, and Roland Sepa, manager of labor relations for Hertz, arranged to meet on June 19, 1986, at a Holiday Inn in Philadelphia for purposes of negotiating a collective-bargaining agreement. Sepa offered to meet Cottrell the evening before the negotiating session to discuss the forthcoming negotiations but Cottrell was unavailable. Sepa told Cottrell he would leave the initial working draft at the desk of the hotel, on June 18, so that Cottrell could review it before the June 19 meeting. Cottrell did not pick up the working draft of the contract until the morning of June 19.

The initial working draft of the collective-bargaining agreement (R. Exh. 3), and all other drafts including the final agreement, signed by Cottrell, began with a preamble which limited the unit to those guards employed at Respondent's Philadelphia airport facilities.

The chief negotiator for Respondent was Roland Sepa and also on Respondent's negotiating team were Joseph Happe, east central zone manager, Thomas Wolk, zone employee relations manager, and Charles Motto, zone security manager.

Michael Radigan, city manager for Philadelphia, who works at the airport, was also part of Respondent's negotiating team.

William Cottrell was chief negotiator for the Union. The Union's negotiating team also included John Weeks who was acting as a union consultant and two guards, Ernest Dorman and Eugene Foster.

Negotiations took place on June 19, and August 20 and 21, 1986. Foster was not present on the afternoon of the August 21 session.

Sepa and Happe both testified that a modification of the unit to consist of the airport locations and exclude Center City and Morrisville was a major high priority item.

Everyone agrees that little progress was made at the June 19 session which lasted approximately 1-1/2 hours.

Sepa contacted Cottrell a short time after the June 19 session and the two of them arranged for further negotiations to take place on August 20 and 21 1986.[2] They also agreed to a private dinner meeting the evening before the negotiations, i.e., August 19 to discuss the proposed contract.

Prior to the August 19 dinner meeting Happe discussed what was to occur at the meeting with Sepa. He reemphasized that limiting the unit to the airport locations was a priority.

Record testimony reflects that some of the reasons Respondent desired to limit the scope of the unit are as follows: Center City, unlike Cargo City is not located at the airport and Morrisville is 40 miles from the airport. Morrisville, in contrast to the airport, does not rent cars, it only repairs and sells them to the public. Another distinction between the airport facilities and Morrisville, is that Morrisville does not have shift bids or a 7-day week, 24-hour-a-day operation. Center City is not open 24 hours a day. Morrisville has a different company area number from Philadelphia and Radigan, Respondent's city manager for Philadelphia, does not have jurisdiction over Morrisville.

On the evening of August 19, Sepa and Cottrell met in the dining room of the Holiday Inn in Essington. At this time,

[1] The unit certified by the Board. See Conclusion of Law 3.

[2] All dates are in 1986 unless otherwise indicated.

by Cottrell's own admission, he had the initial working draft of the agreement in his possession for approximately 2 months and he had looked at it.

According to his testimony, Sepa raised the subject of the contract's preamble during dinner, stating that it was of particular interest to the Respondent that jurisdiction be confined to the Philadelphia airport. Sepa then asked Cottrell how he felt about this language in the contract and according to Sepa, Cottrell responded, ''That seems fine, because that's all we wanted anyway.'' Cottrell denied that there was any discussion at the dinner meeting about modifying or changing the scope of the unit.

Wolk testified that on August 20 prior to entering into the negotiations Sepa registered his pleasure that his dinner meeting with Cottrell had been a success with respect to limiting the scope of the unit to the airport locations. Moreover, Sepa instructed Wolk to take extensive notes during the sessions because he, Sepa, would be busy as chief negotiator.

Throughout the negotiations, Sepa worked from a copy of the contract draft, wherein he made handwritten notes reflecting the progression of the negotiations.

According to Sepa's testimony, the issue of the preamble was raised at the table on August 20, and Cottrell asserted that the preamble in the contract was acceptable. As if for emphasis, apparently, Sepa asked Cottrell, ''Do you realize what it embodies?'' Cottrell allegedly replied, ''It's perfectly alright. Yes, I do.''

Documentary evidence and record testimony disclosed that when Cottrell agreed to the preamble, Sepa marked ''O.K. 8/20'' next to the preamble on his draft and he also noted three exclamation points. When questioned as to the meaning of the three exclamation points, Sepa responded ''Very frankly, I was happy that they agreed to that kind of language because, as I said, it was a high priority item with us.''

Cottrell has maintained throughout the hearing that he never agreed, either at dinner with Sepa on August 19, or during the negotiations the next day August 20, to modify the unit.

Happe, Wolk, Motto, and Radigan, testified at the hearing where they corroborated Sepa's version with reference to the preamble discussion in every respect.

In his affidavit to the Board, Cottrell stated:

> I felt this was the best agreement the union could get since it was advised by two other unions who represent employees in different bargaining units of the same employer that the employer was very difficult to deal with and to take whatever contract I could get. I therefore signed the contract on behalf of the union. And the contract which I signed reflected the total agreement of the parties on all terms.

Happe testified that Sepa moved the contract to his left so it was in front of Happe, Happe saw Sepa make the notations and the exclamation points on the draft.

Wolk testified that he ''absolutely'' saw Sepa make the notations.

Wolk's extensive notes (R. Exh. 4) also reflect that the preamble was ''acceptable.''

Sepa and Wolk testified that throughout the negotiations Cottrell in response to Respondent's proposals stated, ''How do you expect me to get this ratified?'' Or, ''Don't you realize I have to get this ratified?'' Such comments were in response to proposals by the Respondent involving the reduction of benefits.

Happe also testified that Cottrell, on several occasions, asked how he expected to get the contract ratified. Moreover, according to Happe's testimony at the conclusion of the negotiations, Sepa told Cottrell that ratification would be necessary in order to enact the labor agreement. Moreover, according to the testimony, Cottrell asked Respondent Representative Happe if he could provide a place for a meeting (for ratification), to which Happe responded that he would.

At the conclusion of the August 21 meeting, Sepa told Cottrell that it was company policy not to execute an agreement until it had been ratified, therefore the contract would not take effect until ratification. Cottrell responded that that was fine with him. The parties then tentatively set a ratification vote for the following Thursday.

Happe, Radigan, Motto, and Wolk all testified that they heard Sepa demand, and Cottrell agree, to ratification being necessary prior to the execution of the agreement.

Sepa also asked Cottrell whether he would recommend the contract to the employees, to which Cottrell responded that he absolutely would.

Nevertheless, ratification never occurred.

Members of the union's negotiating team testified that ratification was not raised as a prerequisite to putting the contract into effect. Cottrell did testify that on one or two occasions during negotiations, he responded to proposals that were not acceptable to him, by asking ''How could I get that ratified?''

Thereafter, Sepa pasted up copies of the final agreement to send to city manager Radigan in Philadelphia. Attached to the agreement, as an appendix, was a two-page document entitled ''Letter of Agreement'' which reflected additional provisions agreed to by the parties during the negotiations.

It is noted that the letter of agreement contains, as does the contract, a preamble which limits coverage to a unit of employees at the airport locations.

Sepa advised Radigan that he would be receiving copies of the contract but that he should hold them until union ratification. Copies of the contract were sent to Radigan on September 4.

Although ratification had not occurred, on October 9, Radigan sent 15 copies of the contract signed by Respondent to Cottrell, as a means of showing good faith, and in the hopes that this act would encourage a ratification.

In April 1987, the Union returned copies of the contract to Respondent, some of which had been signed by Cottrell. His signature also appeared on some copies of the letter of agreement.

In telephone conversations during June and July 1987, Sepa and Cottrell spoke. Sepa told Cottrell that Respondent would not implement the agreement unless the agreed upon ratification was held. Moreover, Sepa took the position that unless Cottrell could show him something to establish that ratification by the membership was not required, he would not change his position. Sepa was referring to the union's constitution and bylaws.

According to the testimony of Sepa, during the latter conversation, Sepa testified that Cottrell was angry and addressed the subject of the scope of the bargaining unit by

stating, ''He was going to get me and go to the Board and try to get everything back in that he didn't negotiate.''

In June 1987, Wolk received a phone call Rochelle Schad, secretary-treasurer of the National Federation of Guards, Local 5, requesting a list of names and addresses of the guards employed by Respondent.

Wolk had Radigan get the list together and Radigan sent the union a list which included the guards at Morrisville. When Wolk realized the error in including Morrisville employees he became very upset and telephoned Schad. He apologized for failing to include addresses and he informed Shad that Respondent would not 30 provide the names or the addresses of the employees working in Morrisville or in Center City because they were not part of the bargaining unit. On Schad's copy of the list (G.C. Exh. 12) she noted that no other locations, other than the airport locations, are to be included and that Wolk apprised her of this.

Schad testified that after a conversation with Cottrell, on June 21, 1987, she sent a letter[3] to the guards notifying them inter alia that a meeting was scheduled for June 25, 1987, and ''at this meeting we will ratify the contract.''

Schad explained the basis for her including in the letter that ratification would take place: ''Because I was using it (ratify), in the terms of ratifying, as uniting everybody together. I was using it wrong. And, I stood to be corrected very severely.''

Schad had been a member of the security guard's union and had worked in and around the labor movement for approximately 9 years.

No ratification vote occurred at the June 25 meeting.

On August 25, 1987, Schad sent a letter to Lerner, counsel for Respondent, demanding that Respondent rewrite the preamble of the agreement to ''Correctly reflect the exact language which appears in the certification of representative issued by the National Labor Relations Board.'' Schad also requested a list of names and addresses of all employees ''who would have been covered under the contract from the date of signing, which was August 27, 1986, through the present time.''

Respondent acceded to Schad's request by sending a list containing the names and addresses of guards working at the airport, but would not provide names and addresses of guards employed at the Center City or Morrisville locations.

Conclusion and Analysis

I am convinced by the overall preponderance of the evidence, that Respondent and the Union mutually and expressly agreed that ratification was a precondition to the implementation of the contract. Accordingly, Respondent's refusal to put it's terms into effect was not a violation of the Act, but was lawful.

Testimony demonstrated that Cottrell expressed his intent to submit the contract for ratification. Moreover, Sepa told Cottrell that it was Respondent's policy not to execute a contract until it had been ratified. Cottrell specifically expressed agreement to Sepa's condition. At the bargaining table the parties actually set a date and place for the ratification vote.

Moreover, Cottrell refused to even furnish Respondent with the Union's constitution and bylaws in an effort to modify Sepa. Sepa made it clear to Cottrell that he might be willing to waive ratification if Cottrell could or would confirm, by the Union's constitution or bylaws that ratification was not required.

As I sat and listened, and observed the Government's witnesses, I was impressed by their extraordinary selectively, particularly that of Cottrell and Schad. Their definition of ''ratification'' were so off the mark and obviously contrived as to be embarrassing. Schad has enough labor background to draft letters relative to the labor field. There is no doubt in my mind, that Schad, pursuant to discussions with Cottrell, realized that ratification, as commonly used in this (labor) field was a precondition to implementation of the contract.

I specifically discredit Cottrell and Schad, particularly where their testimony is at variance with Respondent's witnesses. Cottrell, Counsel for the General Counsel's principal witness, has extensive labor law and negotiating experience. He was General Counsel for the Union, and practiced law for 20 years. As of the time the hearing, he was no longer practicing law. As business agent for the Laborer's Union, for 20 years, he negotiated all of their contracts.[4] He was performing as a consultant to the Charging Parties in this case. He testified that he was also General Counsel to the Union. He also negotiated contracts, 30, for the United Independent Union. At the time, Cottrell was negotiating the contract at issue herein, he had a general law practice.

Cottrell, had, at some time prior to the hearing, been convicted of a crime involving false statements to the Department of Labor.

The record is clear that Cottrell had approximately 6 months to review the final agreement between the parties. It is also manifestly clear, that the scope of the unit was discussed and negotiated, at, and away from the bargaining table.

I fully credit Sepa and all of Respondent's witnesses. Their demeanor, scrupulous attention to detail, certitude, and their notes[5] were in stark contrast to the Governments 20 witnesses.

Cottrell signed a contract which clearly and expressly modified the scope of the certified unit to guards employed at the airport facilities. This was the unit desired by the Charging Party originally.

I do not, for a minute, believe Cottrell signed the contract because he did not read it carefully enough.

As regards corroborating witnesses Weeks, Foster, and Dorman, I find their testimony to be obscure, contradictory and vague. Therefore, I discredit them.

Initially, Weeks testified that there was discussion with respect to the scope of the unit. He later denied such discussion. Weeks was not even certain if Cottrell had of working draft of the contract before him during negotiations. He also testified that ''something'' was signed by Sepa and Cottrell at the conclusion of the negotiations. No one else was aware of any affixing of signatures to the contract or to any other document.

Foster could not even recall whether or not he had a draft of the agreement during negotiations. The fact is he did work from a draft and he took notes. He did not seem to even understand the meaning or import of a preamble.

[3] R. Exh. 2.

[4] They had 106 contracts at that time.

[5] It is noteworthy that Cottrell's own notes reflect his agreement to the preamble. His attempts to explain away were concocted and ill-defined.

Dorman could not even conclude that any of the parties were working from drafts during the negotiations. Dorman denied that he looked for his negotiation notes because they were ''irrelevant.'' In the next breath he testified that he attempted to find his notes, to no avail.

Respondent is under no obligation to provide the Union with any information regarding the Center City and Morrisville guards because they had been expressly excluded from the unit.

Respondent makes a cogent argument that an alternative finding on my part might be that there was no meeting of the minds as to the scope of the unit. I do not reach this, because I am convinced, by the record as a whole, testimony and documentary, that Cottrell knew precisely what the parties negotiated and he signed a contract that he intended to sign, intact and unchanged. For some reason, not reflected in the record, Cottrell had second thoughts and changed his mind.

Based on the foregoing, I recommend that the 8(a)(1) and (5) and 8(d) allegations of the complaint be dismissed. The independent refusal-to-furnish information allegation shall also be dismissed.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit is to include only those guards employed at Respondent's two airport facilities, with the exclusions appearing in the Board's certification.

4. The allegations of the complaint that Respondent has engaged in conduct violative of Sections 8(a)(l) and (5) and 8(d) of the Act have not been supported by substantial evidence.

5. By failing and refusing to furnish the Union with information regarding the Center City and Morrisville locations, Respondent has not violated Sections 8(a)(1) and (5) and 8(d) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

It is recommended that the complaint be dismissed in its entirety.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.